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# PERCEIVED RISKS, OBLIGATIONS, AND UNCERTAINTIES: ANTECEDENTS OF UNPAID CONTRACTORS' INTENTION TO SUSPEND WORKS AGAINST NON-PAYMENT

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Non-payment issues have plagued the Malaysian construction industry for decades. To remedy non-payment, unpaid contractors can choose to mediate, adjudicate, arbitrate, or suspend works contractually. In spite of this convenience, previous studies have shown that the contractors in Malaysia do not favor this right in remedying non-payment, and similarly there is almost no case law to further illustrate the adversities in exercising this right. Previous study revealed that suspension of work was less favored. Until today, there is no study to explain the underlying reasons for this disinclination. Since there are no direct cases that deal with the proposition, the discussion of the issues in this paper is by way of indirect cases which are related to the problems that may arise when contractor suspends works. By using available case laws and reference to two Malaysian standard forms of contract such as CIDB 2000 and PAM 2006, this study postulates that possible perceived risks, obligations, and uncertainties are the antecedents of contractors' intention to suspend works against non-payment. Accordingly, the findings shed a light to the practitioners about the do's and don'ts in suspension of work. Optimistically, it offers premises for elevating these inhibitors, and thus increases the adoption of this clause with future interventions.

*Keywords*: Suspension of work, Perceived risks, Obligations, Uncertainties.

## 1 INTRODUCTION

Non-payment issues have plagued the Malaysian construction industry for decades. To remedy non-payment, unpaid contractors can choose to mediate, adjudicate, arbitrate, or suspend works contractually. In spite of this convenience, previous studies have shown that the contractors in Malaysia do not favor this right in remedying non-payment, and similarly there is almost no case law to further illustrate the adversities in exercising this right. Che Munaaim et al. (2007) attempted to highlight the seriousness of non-payments and ways to sustain payment flows in construction industry. The study revealed that suspension of work was among the top three less preferred avenues in remedying non-payment. Presumably, contractor's intention to suspend works are influenced by possible contractual and behavioral difficulties that impede their

intentions to suspend works; or perceive that suspending works implies more risks and obligations compared to the other avenues; or even uncertain over the entitlements following suspension of works.

Suspension of works is generally termed as cessation of construction activity by the contractor in a construction contract before the works are completed (Chow 2006). By suspending the works under the contract, the parties merely stop or cease all related activities on a temporary basis without excluding the inclusive rights and obligations (Harbans Singh 2003). In Malaysia, both PAM 2006 and CIDB Standard Form of Contracts are widely used. The right to initiate suspension of works is stated in clause 30.7 of PAM 2006, and clause 42.10 of CIDB 2000. According to clause 30.7 in PAM 2006, if the employer do not pay within 14 days after receiving a suspension notice by the contractor, the contractor must further issue a written notice delivered by hand or by registered post to effect his suspension of work and provided that such notice shall not be given "unreasonably or vexatiously".

In CIDB 2000 however, the procedure of giving notice is different from PAM 2006. As stipulated in clause 42.10, if the employer fails or neglects to honor the interim certificate within the period of honoring the certificate, and continues for 14 days from the due date of honoring certificate, the contractor may give notice of his intention to suspend works.

## 2 PERCEIVED RISKS, OBLIGATIONS, AND UNCERTAINTIES

This study postulates three different possible perceived risks, obligations and uncertainties in influencing contractors' intention to suspend works. These possible antecedents of intention to suspend works are speculated based on specific instigated clauses with reference to available case laws.

### 2.1 Perceived Risk 1: Wrongful Suspension of Work

Sheridan (2012) postulates that unpaid contractors' concern on the risks of wrongful suspension of works that might lead to repudiatory breach. In the recent case of *Mayhaven Healthcare Limited vs DAB Builders*, the contractors (DAB Builders) had made a genuine mistake in suspending works by believing that the paymaster (Mayhaven) did not honor the payment as pursuant to the adjudicator award. Mayhaven actually had included the payable amount in the next valuation. The court eventually held that the contractor was actually exercising suspension of works in good faith, which did not constitute to a repudiatory breach. Although this case favored the contractor, in practice this concern is not without basis, as:

- There is no common law right for the contractor to abandon his works in face of non-payment.
- There are possibilities of wrongful suspension of works that may lead to further disputes.

Suspension of works might be even wrongful if the paymaster holds the right to set-off, and asserts that the amount claimed by the contractor is not due. In Malaysia, the right to set-off can be traced back in the case of *Kemayan Construction Sdn Bhd vs Prestara Sdn Bhd*. The court held that the employer was justified for refusing to pay, as

it was the contractor's failure to rectify the defects at its own cost as per architect's instruction that triggered the employer a right to set off contractually.

In CIDB 2000, there is no direct wording on set-off, and yet there is no express wording which precludes and negates the right to set-off. In clause 42.10 (a) CIDB 2000, it stipulates that:

> "*If the Employer fails or neglects to make payment of any amount due to the contractor within the Period Honoring Certificate* (*unless under the terms of the contract the said interim certificate has been corrected or modified by a later interim certificate which has been issued due to correction of certificates in clause42.4, or the employer may be empowered by the provisions of the contract either not to pay, or to make deductions from the sums shown in the certificate*) *, and such failure shall continue for a further 14 days from the date such amount is due for payment, then the contractor shall give notice of his intention to suspend work. If the employer shall continue to default in payment 14 days after the receipt of the notice, the contractor may suspend wholly or partly the further execution of the works, or reduce the rate of the works."*

This clause indicates that the employer can hold the ground of set-off (make deductions) from the sum shown in certificate as the ground for valid non-payment; however the categories for deductions are not mentioned in CIDB 2000. As been held in the case of *Gilbert-Ash (Northern) Ltd vs ModernEngineering (Bristol) Ltd*, there is no special rule of construction operating in building which precludes and negatives the ordinary common law right of set-off in employer. With this principle, employer still can set-off the interim certificate under CIDB 2000 with the reasons such as contractor's failure to comply to architect's instruction, overpayment, late delivery, and etc. Nevertheless, the case of *Mondel vs Steel* implies that the employer still retains the Common Law right to set-off. The Employer would set off the amount which constitutes for his vindication for non-payment.

While in PAM 2006, the right to set-off operates under the principle of "*expressio unius est exclusion alterius"*. That means the employer has the right to set-off, however is only limited to what is expressly stated in clause 30.4. Accordingly, the employer is only allowed to set-off provided that the architect or quantity surveyor submitted their details of their assessment of such set off, and has given the contractor a written notice delivered by hand or by registered post, specifying his intention to set off the amount and the grounds on which such set-off is made. Unless expressly stated elsewhere, such written notice shall be given not later than twenty eight (28) days before any set-off is deducted from any payment by the employer. The contractor can argue and disagree with the amount of set-off**.** Clause 30.4 (b) continue to state that if the contractor after receipt the written notice from the employer or the architect on his behalf and wishes to dispute the amount of set-off, shall within 21 days of receipt of such written notices send to the employer delivered by hand or by registered post a statement setting out the reasons and particulars of such disagreement. And if the parties still are unable to agree on the amount of set-off within a further 21 days after the receipt of the contractor's

response, either party may refer the dispute to adjudication. A contractor who intends to suspend works must be really careful and mindful with the sum claimed to be unpaid within the honoring period is really due after taking into account of any issues related with set-off.

### 2.2 Perceived Risks 2: Vexatious and Unreasonable Notice

In PAM 2006, contractor must further issue a written notice delivered by hand or by registered post to effect his suspension of work and provided that such notice shall not be given "unreasonably or vexatiously"; while in CIDB 2000, the wordings of "unreasonably or vexatiously" is absent. Several cases in the past have demonstrated contractors' notices have been legally challenged.

In *J.M Hill and Sons Ltd vs London Borough of Camden*, the contractor had sent a notice of determination in accordance to clause 26(1) (a) of the contract which allow for determination. The employer eventually claimed that the notice of determination was "unreasonable". The court held that "unreasonable" as the act of taking advantage on the employer.

In another case of *John Jarvis vs Rockdale Housing Association Ltd*, the claimants gave notice to terminate his employment. However, such notice of termination was argued to be "vexatious". The court defined "vexatious" to be "an ulterior motive to oppress, harass, or annoy", and eventually the court held that such notice by the claimant was not vexatious and was entitled to terminate the contract.

In the third case of *Reinwood Ltd v Brown & Sons Ltd*, Brown issued a notice to determine its employment under the contract for the repeat of the specified default of payment by Reinwood. Reinwood claimed that such notice of determination has been given "unreasonably and vexatiously". In this case, the court held several important points on the definition for both "unreasonably and vexatiously". Three important points are:

- "Vexatious" means the contractor determined the contract with the ulterior motive or purpose of oppressing, harassing, or annoying the employer.
- The test of what is "unreasonable" is ascertained by how a reasonable contractor would have acted in all the circumstances.
- The effect of the determination on the employer is a relevant factor and it might be unreasonable if it disproportionately disadvantages the employer.

Contractors who intend to suspend works must not be serve the required notice "vexatiously" and "unreasonably", and there are always possibilities that the employer can always challenge the contactor by using this ground.

### 2.3 Perceived Risk 3: Absence of Back to Back Basis in Sub-Contracts

One important mechanism in suspension of works is the ability of the contractor to commensurate suspension downstream, such as the subcontractors, and workman (Harbans Singh 2003). It is vital for the contractor to have this back to back provisions incorporated in the sub contracts. When the contractor suspends works, he may want to

demobilize his works and retreat his work force, and order the sub-contractor to cease works as well. However without an express clause in the sub-contract will prove difficulties for the contractor to do so.

In *The Jardine Engineering Corporation Limited v Shimizu Limited*, the contractor was entitled to claim against the employer for compensation of loss and expenses for delay. The nominated sub-contractor also intended to claim against the main contractor for loss and expense suffered for delay that was not at the sub-contractor's fault. The sub-contractor claimed that there were implied terms that enabled them for such entitlements, and the sub-contract ought to have incorporated the relevant provisions of the main contract. In addressing the importance of back to back provisions, Justice Kaplan in this case stated that a true back to back contractual relationship should incorporate all clauses of the main contract into the sub-contracts without any ambiguities. Similarly, contractors that intend to suspend works should assure that the sub-contract incorporate suspension clause as well. In PAM 2006 Nominated Sub-Contract, back-to-back provisions have been incorporated in sub-clause 26.16 (suspension of main Contract Works), which stipulates that:

> *"Where under the Main Contract, the contractor exercises his right to suspend performance of his obligations, the Contractor shall so notify the subcontractor in writing and may direct the Sub-contractor to suspend performance of the Sub-contract works. The Sub-contractor shall be entitled to an appropriate extension of time under clause 21.0 and loss/or expense under clause 22.0"*.

On the contrary, the CIDB Nominated Sub-contract [CIDB.B (NSC) /2002] is not straight forward compared to PAM Sub-Contract 2006 regarding to suspension of work. Nevertheless, contractors can always issue all instructions to the nominated subcontractors on matters relating to Sub-contract as laid out in clause 4.2. In addition to that, clause 5.1 of the sub-contract stipulates that the Nominated Sub-Contractor shall:

> "*observe, perform and comply with all provisions of the main contract on the part of the contractor to observe, perform and comply with in so far as they relate and apply to the subcontract works or any part of the sub-contract works which are not repugnant to or inconsistent with the provisions of the sub-contract"*.

Back-to-back provisions relating to the contractor's right to suspend sub-contractor's works is somehow vague in CIDB.B (NSC) /2002.

### 2.4 Perceived Obligations and Uncertainties

Although the contractor is entitled to cease all necessary works, one noticeable feature of obligation for the contractor enshrined in both PAM 2006 and CIDB 2000 is the obligation to secure and protect site. He cannot leave the site as he has the responsibility and obligations to secure and protect the works. In assigning this

responsibility, the consequence risks during the suspension period are accordingly passed to him, and he then remains primarily liable for the security of the works, protection against the elements and deterioration from foreseeable causes.

Stated clearly in clause 42.10 (c) (iii) CIDB 2000, the contractor can claim loss and expense arising from the suspension, and arising from resumption of normal working. Similarly in clause 24.1(a) PAM 2006, contractors can claim loss and expense if he has incurred loss and expense arising from suspension. However, uncertainties over the adequacy of loss and expense and extension of time is another factor that influence the usage of suspension clause (Sheridan 2012).

## 3 CONCLUSIONS

With reference to PAM 2006, CIDB 2000 standard form of contract and case laws, this paper highlights possible risks, obligations and uncertainties that a contractor may encounter in suspension of works. Derivations from these discussions have led to the possibility of perceived risks, obligations and uncertainties which are assumed to influence behavioral intention in suspension of works. Future interventions can be designed to elevate these inhibitors and thus increase usage in suspension clause.

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